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Supreme Court of the United States.

OCTOBER TERM, 1907.

NO. 164.

W. H. GAZLAY, HANNAH F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART AND CLARA G. KUHN,

APPELLANTS,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, A BANKRUPT,

APPELLEE.

MOTION TO DISMISS APPEAL AND BRIEF ON SAID MOTION.

PROVINCE M. POGUE,
OF COUNSEL FOR APPELLEE.

Supreme Court of the United States.

OCTOBER TERM, 1907.

NO. 164.

W. H. GAZLAY, HANNAH F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN,

Appellants,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, A BANKRUPT,

Appellee.

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Appellants,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, A BANKRUPT,

Appellee.

MOTION TO DISMISS APPEAL.

Now comes Fletcher R. Williams, Trustee and Appellee, and entering his appearance herein for the purposes of this motion only, expressly refraining from entering his appearance herein for any other purpose, and reserving to himself all rights to which he may be otherwise entitled, moves this Court to dismiss the petition and proceedings on appeal herein, for the following reasons:

First: That the Court has no jurisdiction of the cause; and,

Second: That the said proceedings were filed after the time allowed by the Act of Congress, the practice in this Court and Rule 36 of this Court, relating to appeals in bankruptcy from the Circuit Court of Appeals to this Court.

FLETCHER R. WILLIAMS, *Trustee,*

By PROVINCE M. POGUE,

Of Counsel for Appellee.

POGUE & POGUE,

Attorneys for Appellee.

To Oscar W. Kuhn, Attorney of Record, for Appellant in the above-entitled case:

You are hereby notified that the appellee in the above-named cause will, on Monday, the 21st day of October, A.D., 1907, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court the foregoing motion and the brief thereon, hereto attached.

PROVINCE M. POGUE,
Of Counsel for Appellee.

Service on the above motion, notice and brief hereto attached are hereby acknowledged this day of , A. D. 1907.

_____
Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1907.

NO. 164.

W. H. GAZLAY, HANNAH F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN, Appellants,

vs.

FLETCHER R. WILLIAMS, TRUSTEE OF HARRY D. BROWN, A BANKRUPT, Appellee.

BRIEF ON BEHALF OF APPELLEE ON MOTION TO DISMISS.

STATEMENT OF THE CASE.

The facts involved in the case are simple. On July 7th, 1902, William H. Gazlay and others, appellants herein, as lessors, granted to Joseph D. Kueny, his executors, administrators and assigns as lessee, the premises in controversy, located on Vine street, Cincinnati, Ohio, for a period of ten years, ending July 7, 1912. (Record, p. 10.)

Among other conditions in the lease are the following:

> "Provided, however, that..... if said lessee shall assign this lease or underlet said leased premises or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process first had; or if said lessee or assigns shall fail to keep any of the other covenants of this lease by said lessee to be kept, it shall be lawful for said lessors, their heirs or assigns, into said premises to re-enter, and the same to have again, repossess and enjoy, as in their first and former estate; and thereupon this lease and everything therein contained on the said lessor's behalf to be done and performed, shall cease, determine and be utterly void."

There is also a covenant by which the lessee, for himself and assigns, agrees

> "That he will not assign this lease nor underlet said premises nor any part thereof without the written consent of said lessor,"

But there is no covenant as to the matter of a sale.

"Under execution or other legal process." (Record, p. 11.)

Kueny entered into possession under the lease, but subsequently, on April 9th, 1904, the lessors, appellants herein, brought a suit in the Superior Court of Cincinnati, Ohio, alleging non-payment of rent by Kueny, the lessee, and asking for the sale of

> "Said leased premises and the unexpired term thereof, subject, however, to the terms, covenants and conditions contained in the lease from said plaintiff to the said Joseph D. Kueny." (Record, p. 7.)

All the parties then in interest were made parties to said suit and filed pleadings therein, in which, in terms and impliedly, they assented to all the proceedings had in that cause in the Superior Court. As a result, the property was sold as prayed for by the lessors at public auction, and Harry D. Brown, the bankrupt, became the purchaser, entered into possession, and made extensive improvements, all by and with the consent of the lessors, appellants herein, who received rent from him pursuant to the terms of the original lease with Kueny. (Record, p. 8.)

Subsequently, on January 17th, 1906, proceedings in involuntary bankruptcy were instituted against said Brown, and Fletcher R. Williams was put in possession of the premises as receiver by the District Judge. As such receiver he tendered to the lessors, appellants herein, one month's rent for the premises, due in January, 1906. They received it and gave a receipt to such receiver in bankruptcy. In February, 1906, Brown was adjudicated a bankrupt, and the case was regularly referred to Charles T. Greve, as referee, and on February 27th, 1906, the same Fletcher R. Williams, at the meeting of the creditors, was elected trustee, gave bond, and entered into possession of the property in question. (Record, p. 9.) The inventory and appraisement of the bankrupt estate included the interest of the bankrupt, Brown, in this leasehold estate, which was valued in the appraisement at $10,000. Subsequently, March 5, 1906, Williams, trustee and appellee, tendered rent for said premises to the lessors, appellants herein, who accepted it and gave him a receipt as such trustee. (Record, pp. 9, 10.)

It appearing that the lessors, appellants herein, disputed the right of said trustee, Williams, to sell said leasehold interest as a part of the bankrupt estate, the trustee filed in this original cause in bankruptcy an application asking that the lessors be made parties hereto as necessary parties for the complete determination of the matters in controversy. All the lessors were made parties and duly served with process. (Record, p. 2.) Thereafter the lessors filed a motion herein asking the Court to dismiss them from the suit, on the ground that the Court had no jurisdiction to bring them in as parties, unless by their consent, which they expressly reserved.

The petition, motion to dismiss and all matters relating thereto were referred to the referee, Charles T. Greve, who, after argument, overruled the motion of the lessors, appellants herein, and gave leave to said lessors to answer, reserving to them in the entry granting such leave the right to raise the question of the jurisdiction over the presence of the lessors, and the right to answer to the merits, without prejudice to their rights to insist upon the lack of jurisdiction over the presence of the lessors. (Record, pp. 3, 4.)

The referee thereupon heard the arguments upon an agreed statement of facts, both as to the question of jurisdiction and the merits as raised by the petition of the trustee and he answer of the lessors.

It is conceded by the lessors, appellants herein, that the possession of Brown, the bankrupt, the purchaser at the sale by the Superior Court, was lawful, and can not be urged as a ground of forfeiture, and that the interest of Brown passed by operation of law to Williams, the trustee in bankruptcy, and appellee herein, and that the latter is lawfully in possession, and that the transfer of the interest, by virtue of the bankruptcy proceedings to the trustee in bankruptcy, did not constitute a breach of the conditions or covenants of the lease, and is not of itself a ground of forfeiture.

It is claimed, however, that the interest of the bankruptcy trustee is subject to the condition that

> "If said lessee inerest herein shall be sold under execution or other legal process, without the written consent of said lessors, their heirs or assigns is first had, it shall be lawful for said lessors," etc.
>
> "Into said premises to re-enter," etc.

And that it is not their intention to waive this condition nor give a written consent to any sale of said interest other than has already been given by the circumstances of the case, and if any sale of the leasehold is made they, the appellants, will forfeit the leasehold and bring a suit to eject the purchaser. Of course, with such a threat, it was difficult to sell or sub-let, and the trustee, the appellee, was forced to quiet the title to this valuable $10,000 asset by having the contending parties, the appellants, before the Court.

Based on such a statement of facts, which is agreed and undisputed, the Referee, in an elaborate opinion, held:

First, that the claim of the lessors, the appellants herein, that the District Court had no jurisdiction over the persons of the appellants for the purpose of this controversy, as set up in their answer and the petition of the trustee, was not well founded (Record, p. 4), and,

Second, that, it being admitted that the trustee, the appellee, is lawfully in possession thereof by operation of law by the waiver of the lessors, the appellants (Record, p. 9),

the referee made the following order (Record, p. 16):

> "The referee further finds that F. R. Williams, trustee in bankruptcy of the bankrupt, Harry D. Brown, has elected to take said leasehold estate, and is in lawful possession of the same, and is entitled to sell said leasehold estate, convert the value thereof into money for the purpose of distributing the money realized from the sale thereof, and free from the claim of said lessors hereto named to forfeit said estate by reason of said sale by the trustee or of the proceedings heretofore had herein, and the referee further finds that said trustee aforesaid is entitled to convey said leasehold estate free from claim of said lessors to forfeit said leasehold by reason of the bankruptcy of said H. D. Brown, or by reason of any sale or assignment of said leasehold property that may be made pursuant to the orders of this Court, for the purpose of converting said property into assets for distribution, to all of which rulings and orders of said referee, said lessors, William H. Gazlay, Hannah F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, hereby except. This cause is reserved for further orders of the referee herein as to all matters not determined herewith."

The lessors, the appellants, filed a petition to review the orders of the referee in the District Court at Cincinnati, Ohio. The cause came on for hearing before the District Judge, Hon. A. C. Thompson, and he affirmed the orders of the referee and dismissed the petition for review on June 2, 1906 (Record, p. 25).

The lessors, the appellants, took an appeal to the Circuit Court of Appeals for the Sixth Circuit, to be filed within thirty days from the signing thereof by the Honorable J. K. Richards, United States Circuit Judge. The appeal as granted was filed in the Circuit Court of Appeals, June 6, 1906. The case came on for hearing on appeal and was advanced by the Circuit Court of Appeals under the rules of the Court, it being for the benefit of the bankrupt estate, oral argument was waived, and it was decided on the briefs that were submitted by the appellants and appellee and the Court therein on June 15, 1906, affirmed the District Court. (Record, p. 30.)

Gazlay vs. Williams, 147 Fed. 678.

The Court will notice from the record herein that the decree was entered in the Circuit Court of Appeals on the 15th day of June, 1906. The written opinion was filed in the Circuit Court of Appeals on July 16th, 1906. No petition for a rehearing was filed by the appellants. The appellants never prayed an appeal to this Court until November 16, 1906, and did not file their appeal in this Court until the 16th day of December, 1906. We submit in view of the foregoing statement of

facts that the appeal should be dismissed under the acts of Congress and Rule 36 as adopted by this Court, applicable to bankruptcy proceedings, wherein appeals are taken to this Court from the decrees of the Circuit Court of Appeals.

I.

THE DISTRICT COURT HAD JURISDICTION TO DETERMINE THE MATTER IN CONTROVERSY.

Chapter 2, Bankrupt Act, Sec. 2.

The foregoing provision of the bankruptcy act, we submit, has been construed as applicable to the case at bar and shows that on the statement of facts here undisputed, the District Court had jurisdiction of the matter in question.

First National Bank vs. C. T. & T. Co., 198 U. S. 280.
Whitney vs. Wenman, 198 U. S. 539.
White vs. Serloub, 178 U. S. 542.

The application of the trustee in this case was in the nature of a bill to quiet title to property in possession of the trustee and provide against the adverse claim of the right of forfeiture.

Blair vs. City of Chicago, 201 U. S. 400.

The Court had the power to bring in and substitute additional parties when necessary for the complete determination of the matter in controversy, realize on this value asset of the estate by converting it into money and then distribute it among the creditors.

Hewitt vs. Berlin U. S. Machine Works, 194 U. S. 296.
York Mfg. Co. vs. Cassell, 201 U. S. 344.
Mueller vs. Nugent, 184 U. S. 1.
Bryson vs. Bunkumer, 181 U. S. 188.

As the Court had jurisdiction being in possession, the trustee had a right to sell or transfer the property for a valuable consideration for the benefit of the creditors free from any right of forfeiture on the part of the lessors, the appellants.

First Nat. Bank vs. C. T. & T. Co., 198 U. S. 280.

II.

THE DISTRICT COURT HAVING JURISDICTION AND THE APPEAL NOT HAVING BEEN PROSECUTED FROM THE CIRCUIT COURT OF APPEALS WITHIN THE TIME PRESCRIBED BY THE ACT OF CONGRESS, RULE 36 OF THIS COURT AND PRACTICE IN THIS COURT RELATING TO BANKRUPTCY APPEALS, THIS COURT HAS NO JURISDICTION OF THIS CAUSE ON APPEAL.

When this case was presented to the Circuit Court of Appeals, by reason of the peculiar character of the case, the value of the asset to the estate and the importance of an early hearing so as to determine the rights of the respective parties, that Court advanced this case on its calendar and heard it immediately, as the record shows. The appellant deliberately delayed the filing of an appeal in this case to this Court nearly six months. If it were prosecuted in good faith promptly it might have been entitled to some consideration. This proceeding ties up the property to the detriment of the bankrupt estate.

By reason of this condition of affairs, the trustee and appellee herein, is urging this motion and insists it should be granted in accordance with the construction that should be and has been placed upon the act of Congress and proceedings in this Court. Having that purpose in view, the appellee has caused the record to be printed in full so as to bring a complete statement of the facts before the Court and every proceeding in this cause, and now urges that by reason of the deliberate delay of the appellants he is entitled to take advantage of any technicality that the law may allow him and not permit the appellants to continue this "dog in the manger" policy any longer.

We submit under the very recent opinion of this Court in the case of Conboy vs. First National Bank, decided November 19, 1906, 203 United States Supreme Court Reports 141, that this Court has no jurisdiction in this cause and we ask that the motion be granted, dismissing the appeal in accordance with Rule 36 and the practice in this Court.

One of the Justices of the Circuit Court of Appeals allowed an appeal to this Court. While the certificate of appeal was granted by a Justice of the Circuit Court of Appeals, we submit that this does not give any validity or standing in this Court for want of jurisdiction in accordance with the same opinion.

Conboy vs. First National Bank, 203 U. S. 141.

The appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

PROVINCE M. POGUE,
Of Counsel for Appellee.

POGUE & POGUE,
Attorneys for Appellee.

No. 1[illegible].

SUPREME COURT OF THE UNITED STATES

[illegible] TERM, 19[illegible]

[illegible]

Appellants,

vs.

[illegible]

Appellee.

BRIEF OF APPELLANTS ON MOTION OF APPELLEE TO DISMISS APPEAL.

[illegible]

Counsel for Appellants.

[illegible]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

W. H. GAZLAY, HANNA F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART AND CLARA G. KUHN,

Appellants,

No. 164. *vs.*

FLETCHER R. WILLIAMS, Trustee of Harry D. Brown, a Bankrupt,

Appellee.

BRIEF OF APPELLANTS ON MOTION OF APPELLEE TO DISMISS APPEAL.

The statement of facts, set forth in appellee's brief herein, in support of his motion to dismiss the appeal filed in this court by the appellants herein, while not entirely accurate, is sufficiently so for the purposes of the motion.

From this statement, it appears that the trustee in bankruptcy filed in the bankruptcy court an application, asking for the sale of a certain leasehold estate of which the bankrupt, Brown, was in possession at the date of the bankruptcy proceedings against him, free of any right or claim on the part of the appellants herein to forfeit the same, by reason of the clause in said lease, providing for a forfeiture of it in case of its sale under execution or other legal process. Indeed, on page 7 of the brief of counsel for appellee, he himself defines the proceedings as being "in the nature of a bill to quiet title to property in possession of the trustee, and provide against the adverse claim of the right of forfeiture."

On appeal to the Circuit Court of Appeals that court held that a sale by the trustee in bankruptcy would not be a violation of the clause in the lease providing for a forfeiture of it in case the lessee's interest should be sold on execution or other legal process, without the written consent of the lessors, because such a sale was not covered by that clause.

Gazlay v. *Williams,* 147 Fed. Rep., 678.

The judgment of the Circuit Court of Appeals in this matter was entered on the 15th of June, 1906.

On the 16th of November, 1906, that court allowed an appeal to the Supreme Court of the United States, and on the 6th day of December, 1906, the petition on appeal, together with an assignment of errors, was filed by appellants in this court, and was docketed as cause No. 513 of the October, 1906, Term.

The appeal was, therefore, perfected within six months from the date of the judgment entry in the Circuit Court of Appeals.

The question presented by the motion to dismiss the appeal, is whether or not the appeal was prosecuted in time.

Whether it was or was not depends entirely upon the nature of the action, for the statutes and the rules of this court prescribe different times within which appeals must be prosecuted to this court, for different actions. For example: In suits for the allowance or rejection of claims in excess of $2,000, appeals to this court must be prosecuted within thirty days from the date of the judgment entry in the Circuit Court of Appeals; while, in matters in which appeals are allowed from a court of bankruptcy to Circuit Courts of Appeal, and the judgments of those courts on such appeals are not made final by the act of March 3d, 1891, establishing Circuit Courts of Appeal, appeals are allowed to this court within one year from the date of the judgment entry in that court.

It remains then to determine the nature of this action.

Our contention is that it is "a controversy arising in a bankruptcy proceeding,"

First. Because it involves the title to property in the possession of the trustee upon the determination of which depends the salability of the property. For if the right to forfeit exists and is exercised, no one will buy the property from the trustee, because he would take nothing by the sale. It is therefore clearly distinguishable from a mere proceeding in bankruptcy.

Second. Because it raises a distinct and separable issue from the mere administrative steps in bankruptcy, and is therefore entirely independent of the mere administration of the estate of the bankrupt, such as the determination of the amount and validity of claims against the bankrupt's estate, or the validity and priority of liens against the bankrupt's property in which appellants have no interest whatever as such, for it is only in the event of a sale by the trustee, and possibly after these matters have all been settled, that their rights come into existence.

Indeed, it was solely for the purpose of determining in advance of a sale, whether or not the right to forfeit, as provided for in the lease, still subsists, and what title, if any, a prospective purchaser from the trustee would take, that the trustee had these appellants made parties to his application, and had the question submitted for a decision.

Hence, being "a controversy arising in a bankruptcy proceeding," and not a mere proceeding in bankruptcy, it comes within the provisions of Section 24*a* of the Bankrupt Act, relating to appeals to the Circuit Court of Appeals, and is therefore under Section 6 of the act of March 3d, 1891, above referred to, appealable to this court within one year from the date of the judgment entry.

Hewitt v. *The Berlin Machine Works*, 194 U. S., 296.

That case involved the question as to the right of the trustee in bankruptcy to sell certain property claimed by

the Berlin Machine Works under a conditional contract of sale made with the bankrupt, and this court held that the question there presented was "a controversy arising in a bankruptcy proceeding" as distinguished from "a mere proceeding in bankruptcy," and therefore was appealable to this court by force of Section 6 of the act of March 3d, 1891.

And while that case did not determine the question of the time within which the appeal to this court had to be taken yet since the act defining the kinds of actions that are appealable to this court also prescribes the time within which they may be appealed, it is only necessary to bring a case within the purview of the act relating to its appealability in order to have the provision as to the time for taking the appeal at once apply.

Counsel for appellee has not pointed out specifically what the act of Congress is, to which he refers in his brief, to support his proposition that the appeal in this case was not prosecuted in time. If he means Section 25*b*, as I infer he does from his citation of the Conboy case, it has no application here, for that section refers to cases involving the allowance or rejection of claims in excess of $2,000, while this case in no sense involves the allowance or rejection of a claim.

Rule 36 of the practice of this court, also cited by him, has no application to this case, because it applies only to appeals direct to this court from a District or Circuit Court of the United States.

The case of *Conboy* v. *The First National Bank*, 203 U. S., 141, also cited by him, was the case of an appeal

from a judgment of the Circuit Court of Appeals, allowing a claim in excess of $2,000 against the estate of a bankrupt, and is clearly of no relevancy here.

It is therefore submitted that the appeal in this case was taken within proper time, and the motion to dismiss the appeal, because not filed within thirty days of the judgment, should be overruled.

Respectfully submitted,

OSCAR W. KUHN,

Counsel for Appellants.

Cincinnati, Ohio, October 15th, 1907.